

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MARC E. PEROSIO
DEBRA J. PEROSIO

CASE NO. 03-67641
Chapter 12

Debtors

MARC E. PEROSIO
DEBRA J. PEROSIO

ADV. PRO. NO. 04-80039

Plaintiffs

vs.

NBT BANK NATIONAL ASSOCIATION and
UNITED STATES OF AMERICA

Defendants

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

**MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

Presently under consideration by the Court is a motion filed on July 26, 2004, by the United States Department of Agriculture - Farm Services Agency ("FSA") seeking summary judgment dismissing the adversary proceeding commenced on February 13, 2004 by Marc E. and Debra J. Perosio (the "Debtors" or "Plaintiffs"). In addition to seeking dismissal of the adversary proceeding, FSA also asserted a counterclaim for reformation of two mortgages executed by the Debtors in 2001 in its favor. The Debtors responded by filing a cross-motion for summary judgment against FSA on the sixth and seventh causes of action asserted in the Debtors' complaint ("Complaint") on the basis that FSA's mortgages are void pursuant to § 544(a)(3) of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code").

The motions were heard at the Court's regular motion term in Binghamton, New York, on October 12, 2004. Following oral argument, the Court allowed the parties additional time to file supplemental memoranda of law. The matter was submitted November 9, 2004.

In the interim, the Debtors filed a motion requesting summary judgment against NBT Bank, N.A. ("NBT") on October 21, 2004, with respect to the first, second, third and fourth causes of action of the Complaint. Opposition to the motion was filed on December 9, 2004, on behalf of NBT. The motion was heard by the Court on December 14, 2004, in Binghamton, New

York.

At the hearing on December 14, 2004, NBT's attorney conceded that the filing of two lis pendens by NBT, which is the basis for the Debtors' third and fourth causes of action, constituted preferences, which the Debtors are entitled to avoid. *See also* NBT's Memorandum of Law, filed on December 9, 2004, at 3. However, on January 7, 2005, the date the Court had set for the submission of memoranda of law, NBT filed its Supplemental Memorandum of Law in which it asserted that "this response was overbroad . . . the more appropriate response is that the filed Notice of Pendency provided notice to the trustee which is not avoidable as a preference under 11 U.S.C. § 547 because it created no additional rights [for NBT]." On January 11, 2005, at the request of Debtors' counsel, the Court agreed to an extension of the submission date to January 21, 2005, to allow the Debtors an opportunity to respond to NBT's change in position in this regard. A further extension to January 28, 2005, was granted to Debtors' counsel on consent of the parties.

Because the motions involve the same facts and issues, the Court will consolidate the motion by the Debtors against NBT and the cross-motion filed by the Debtors against FSA, as well as the motion filed on behalf of FSA, all seeking summary judgment.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(B), (K) and (O).

FACTS

The Debtors filed a voluntary petition pursuant to chapter 12 of the Code on November 13, 2003. On December 9, 2003, they filed Schedules A-J, as well as a Statement of Financial Affairs. According to Schedule A, the Debtors own three parcels of real property:

97.50 acre parcel improved with house and machinery shop on Devlen Road, Town of Groton, County of Tompkins, Tax Map No. 15-1-9 ("Parcel I");

91.00 acre parcel improved with milking parlor, free stall, heifer barn, calf barn and an old barn, located at 198 Devlen Road, Town of Locke, County of Cayuga, Tax Map No. 251.00-1-37.1 ("Parcel II");

38.48 acres of vacant land on Devlen Road, Town of Groton, County of Tompkins, Tax Map No. 15-1-1.2 ("Parcel III").

According to Schedule D of the Debtors' schedules, NBT holds a first mortgage, "subject to avoidance," on real property in the Towns of Groton and Locke, with a balance owing of \$221,477. Also on Schedule D, the Debtors list the FSA as holding a second mortgage, "subject to avoidance," on real property in the Towns of Groton and Locke. On or about December 10, 2003, the FSA filed a proof of claim (No. 4) in the amount of \$225,821.53. On or about March 5, 2004, Central National Bank, Canajoharie ("CNB"), the predecessor in interest to NBT, filed two proofs of claim (No. 17 and No. 18) in the amount of \$236,791.25 and \$226,174.57, respectively.

As background, the Court notes the following chronology of events, as set forth in the Debtors' Complaint:

The real property identified above was conveyed to the Debtors by deed from Irving T. Brown and Elizabeth A. Brown dated May 13, 1980. *See* Exhibit A, attached to the Debtors'

Complaint. Included in the deed was a description not only of Parcels I, II and III, but also of four parcels excepted from Parcels I and II (“Exceptions”). *Id.*

On or about February 2, 1999, the Debtors executed a note in the amount of \$292,000 and a mortgage in the amount of \$50,000 in favor of CNB. *See Debtors’ Complaint at ¶ 10-11.* It was intended by the parties that the mortgage cover the Debtors’ interest in Parcels I, II and III. *Id.* at ¶ 11. However, the mortgage allegedly only contained a description of the Exceptions to Parcel I and II, as well as a description of Parcel III.¹ *Id.* at ¶ 14.² It did not contain any description of Parcels I and II as set forth in the original deed to the Debtors. *Id.*

Also on or about February 2, 1999, the Debtors executed another mortgage in the amount of \$240,000 in favor of CNB. *Id.* at ¶ 17. Despite the intent of the parties that the mortgage cover the Debtors’ interest in Parcels I, II and III, similar to the first mortgage, allegedly it did not contain any description of Parcels I and II, except for the Exceptions thereto. *Id.* at ¶ 17 and ¶ 20; *see also* Exhibit F attached to the Complaint. It did contain the description of Parcel III. *Id.* at ¶ 20.

On or about May 10, 2001, the Debtors executed a note and mortgage in the amount of \$200,000, in favor of FSA. *Id.* at ¶ 42-43. Like the mortgages previously given to CNB, the

¹ FSA’s counsel alleges that the description of Parcel III, as found in the mortgages, is also in error in that it contains certain lots which the Debtors had sold in the 1990s prior to the execution of the four mortgages.

² In NBT’s answer, filed on March 24, 2004, the allegations asserted by the Debtors in paragraphs 1-6 and 8-13 and 16-19 are admitted. However, NBT denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraphs 14 and 20. It should also be noted that it also denied knowledge and information sufficient to form a belief as to ¶¶ 21, 23-28, 30-35, 38-41 and part of 37, as well as subsequent paragraphs applicable to FSA’s mortgages.

parties intended that it cover the Debtors' interest in Parcels I, II and III. *Id.* at ¶ 43. However, again the mortgage failed to describe Parcels I and II and only included a description of the Exceptions to Parcels I and II, as well as a description of Parcel III. *Id.* at ¶ 46.

Also on or about May 10, 2001, the Debtors executed a second note and mortgage in the amount of \$30,250 with the intent of conveying an interest in Parcels I, II and III to FSA. *Id.* at ¶ 49.³ Consistent with the other mortgages already on the Debtors' real property, the description contained in the mortgage included Parcel III, as well as the Exceptions to Parcels I and II. *Id.* at ¶ 52. It did not contain a description of Parcels I and II. *Id.*

FSA asserts that on May 10, 2001, it also filed a financing statement in the Tompkins County Clerk's office for purposes of perfecting its security interest in certain collateral belonging to the Debtors, including crops, livestock and farm equipment. *See* Affirmation of Jeffrey Baker, Esq., filed on behalf of FSA on October 26, 2004, at Exhibit 1. The financing statement indicates that it was to be indexed in Tompkins County's real estate records in connection with real property owned by the Debtors, namely Tax Map No. 15-1-9 ("Parcel I") and Tax Map No. 15-1-1.2 ("Parcel III").

On or about October 3, 2003, NBT filed a Notice of Pendency⁴ and Amended Notice of Pendency in the Office of the Clerk of the County of Tompkins in an action to foreclose its two mortgages and reform the real property description found in the mortgages. *Id.* at ¶ 29. On or about October 14, 2003, NBT also filed a Notice of Pendency and Amended Notice of Pendency

³ Paragraph 49 states that the mortgage was in the amount of \$32,250. However, a review of the mortgage (Exhibit K, attached to the Complaint) indicates that the amount secured was actually \$30,250, as set forth correctly in ¶ 48 of the Complaint.

⁴ "Notice of Pendency" is also referred to as a "lis pendens."

in the Office of the Clerk of the County of Cayuga in an action to foreclose its two mortgages and reform the real property description found in the mortgages. *Id.* at ¶ 22. FSA was named as a defendant in the action commenced by NBT.

DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure, as incorporated by reference in Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides that summary judgment may be granted where there is “no issue as to any material fact [such] that the moving party is entitled to judgment as a matter of law.” *Federal Deposit Ins. Corp. v. Bernstein*, 944 F.2d 101, 106 (2d Cir. 1991). Both the Debtors and the FSA agree that there is no factual dispute and that summary judgment is appropriate. NBT contends that there are certain disputed issues of fact that warrant denial of the Debtors’ motion for summary judgment against it.

Filing of Lis Pendens by NBT - Debtors’ Third and Fourth Causes of Action

Before the Court may address the motions for summary judgment with respect to those causes of action asserted pursuant to Code § 544(a)(3), it must first consider the Debtors’ motion for summary judgment as it applies to their third and fourth causes of action, which seek to avoid NBT’s lis pendens as preferences pursuant to Code § 547. The parties do not dispute that NBT filed its lis pendens in the County Clerk’s offices of both Tompkins and Cayuga counties in October 2003, approximately one month prior to the commencement of the Debtors’ chapter 12 case.

The Debtors argue that NBT’s lis pendens “perfected or created additional rights in the

Debtors' property in favor of NBT to the detriment of unsecured creditors." *See* Debtors' Second Supplemental Memorandum of Law, filed January 28, 2005, at 7. In support of their position, the Debtors cite to *In re Lane*, 980 F.2d 601 (9th Cir. 1992) and *In re Rising Fast Rentals, Inc.*, 162 B.R. 203 (Bankr. E.D. Ark. 1993). The Debtors argue that the courts in those cases "essentially equated filing of the *lis pendens* with perfection of an interest in the property and found that such perfection effectuated a transfer that was avoidable under § 547 of the Bankruptcy Code." Debtors' Second Supplemental Memorandum of Law at 8.

The analysis of the courts in both of those cases rests on state law, namely that of California and Arkansas, respectively, in which "the recording of the *lis pendens* affects the possession and interests in debtor's property." *Rising Fast Rentals*, 162 B.R. at 204. It should be understood that in certain states

lis pendens "is a statutory device by which the world is put on notice that an order of attachment has been issued with respect to certain real property owned by a party against whom a monetary judgment is sought." (citation omitted) . . . The advantage of *lis pendens*, however, is that it fixes the priority of the lien that arises when the order of attachment is subsequently perfected by judgment and levy.

In re Medlin, 229 B.R. 353, 358 (Bankr. E.D.N.C. 1998) (a case also cited by the Debtors in support of their position).

The cases cited by the Debtors do not involve the filing of a *lis pendens* by a mortgagee holding a consensual lien on the debtor's real property. Instead, they involved allegations of fraudulent transfers by the debtor(s) and efforts by a potential creditor to ultimately secure an interest in the debtor's real property once he/she has succeeded in obtaining a judgment against the debtor. As explained by one such court by way of illustration:

Assume a contract dispute whereby the plaintiff brings state court litigation

seeking \$100,000 in damages. The defendant owns an unencumbered vacant lot worth \$100,000. The plaintiff files a lis pendens notice on the vacant lot. Before any trial or judgment, the defendant files for bankruptcy.

In re Leonard, 197 B.R. 78, 81-82 (Bankr. N.D. Ill. 1996), *aff'd* 125 F.3d 543 (7th Cir. 1997).

The court in *Leonard* concluded that the filing of the lis pendens was avoidable by the trustee pursuant to Code § 544(b). *Id.* at 82. Otherwise, allowing the lis pendens to remain valid would have provided unsecured creditors “with a powerful tool to usurp the congressional goal of equality of distribution among creditors.” *Id.* The court in *Leonard* noted that “the hypothetical contract case is stronger than [the case before it] involving a fraudulent transfer because the defendant in the contract case is *the owner and titleholder* at the time the lis pendens is filed”; whereas the defendant in the fraudulent transfer action is the former owner and titleholder of the real property. *Id.* at n.7 (emphasis in original).

In the matter presently before this Court, it is not dealing with a lis pendens filed by a creditor with the intent to secure a money judgment by obtaining a lien on real property. The Court is dealing with a mortgagee that seeks to foreclose on instruments recorded in the county clerk’s offices and in the process filed a lis pendens giving notice of its intent to seek reformation of its mortgages in connection with a foreclosure action. As noted by the court in *Schoepp v. New York*, 69 A.D.2d 917 (N.Y. App. Div. 1979), a lis pendens “does not create an encumbrance or a lien, it merely provides notice that an action is pending which may affect title to real property.” Based on New York law, the Court concludes that the filing of the lis pendens by NBT in connection with its mortgages was not a transfer of the Debtors’ property or any interest therein that may be avoided pursuant to Code § 547.

Voidability of the Mortgages held by NBT and FSA pursuant to Code § 544(a)(3) - Debtors' First, Second, Sixth and Seventh Causes of Action, respectively

Code § 544(a)(3) allows a trustee, without regard to any knowledge of the trustee, to avoid any transfer of property of the debtor that is voidable by a bona fide purchaser of real property. 11 U.S.C. § 544(a)(3). In a recent case, this Court determined that chapter 13 debtors, except in very limited circumstances, do not have standing to exercise the avoidance powers of a trustee pursuant to Code § 544(a). *See In re O'Malley*, Case No. 03-63315, slip op. at 6 (Bankr. N.D.N.Y. Aug. 5, 2004). However, unlike chapter 13 of the Code, chapter 12 expressly gives the “debtor in possession” all the rights and powers of a trustee serving in a case under chapter 11, including the strong arm powers of Code § 544 (a). 11 U.S.C. § 1203; *In re Double J Cattle Co.*, 203 B.R. 484, 487 (Bankr. D. Wyo. 1995); *In re Hartman*, 102 B.R. 90, 93 (Bankr. N.D. Tex. 1989). The fact that the Debtors in this case were parties to the transactions at issue and had actual knowledge of the four mortgages does not negate those powers. *Double J Cattle*, 203 B.R. at 487, citing *In re Paramount Int'l, Inc.*, 154 B.R. 712, 714 (Bankr. N.D. Ill. 1993). Accordingly pursuant to Code § 544(a)(3), the Court is to view the Debtors as bona fide purchasers of Parcels I and II without any actual knowledge of any competing claim to the property.

The rights of a bona fide purchaser are determined by state law. *In re Rodriguez*, 261 B.R. 92, 94 (E.D.N.Y. 2001). It is the position of the Debtors that they have “conclusively established that the mortgages themselves did not provide constructive notice of this defect insofar as there was nothing in the legal description of the mortgage documents themselves that would lead a reasonably prudent purchaser to believe that the mortgages were intended to cover the 189.7 acre parcel [Parcels I and II].” *See Debtors' Motion for Summary Judgment against NBT at 5*. In taking this position, the Debtors rely on the case of *Bartkowiak v. Kley*, 9 N.Y.S.2d

986 (N.Y. Sup. Ct. 1939)⁵ in which the court indicated that “[t]he parties are ‘not to be charged with notice of the contents of the mortgage any further than is set forth in the register, unless actual knowledge of the mortgage is brought home to them.’” *Id.* at 987, quoting *Beekman v. Frost*, 18 Johns. 544, Lock. Rev. Cas. 378, 9 Am. Dec. 246 (N.Y. 1820). As pointed out by the Debtors, the principle enunciated in *Bartkowiak* has been cited by numerous treatises for the proposition that “a party charged with constructive notice of the contents of a recorded instrument, creating a lien, however, is bound only by what is contained in the record, and is not required to go outside of the record to determine whether the rights of the parties to the instruments are greater or less than those expressed in the instrument itself.” 59 C.J.S. *Mortgages* § 238, fn. 36 (2004). The Debtors’ position was further clarified in their Memorandum of Law, filed on January 7, 2005, in which they state that

unless there is something in the mortgage itself to trigger the inquiry notice, or there is something in the record to indicate what property was intended to be mortgaged, it should not devolve upon a potential purchaser to go outside of the Debtor’s record title to determine if the Debtor in fact owns other property that is described in a mortgage.”

Debtors’ Memorandum of Law at 6.

However, it is important to point out that the parties in *Bartkowiak* were not potential purchasers of the real property. Under New York State law, “the status of good faith purchaser for value cannot be maintained by a purchaser with either notice or knowledge of a prior interest

⁵ *Bartkowiak* did not involve an issue concerning the status of a bona fide purchaser. Instead, the court was asked to determine the priority of two mortgages, one of which contained an erroneous description of the particular piece of real property. The court allowed the reformation of the mortgage recorded in 1918 but could not make a determination on whether it was entitled to priority over the other mortgage recorded in 1938 apparently because of a lack of proof concerning the knowledge to be attributed to the parties. *Bartkowiak*, 9 N.Y.S.2d at 987.

or equity in the property, or one with knowledge of facts that would lead a reasonably prudent purchaser to make inquiries concerning such.” *Chen v. Geranium Development Corp.*, 243 A.D.2d 708, 709 (N.Y. App. Div. 1997).

A purchaser who has completed the examination of the basic conveyances comprising the chain of title⁶ must ascertain whether the property is encumbered by mortgages (citations omitted). The intended purchaser must be presumed to have investigated the title, and to have examined every deed or instrument properly recorded, and to have known every fact disclosed or to which an inquiry suggested by the record would have led (citations omitted). If the purchaser fails to use due diligence in examining the title, he or she is chargeable, as a matter of law, with notice of the facts which a proper inquiry would have disclosed (citations omitted).

Fairmont Funding, Ltd. v. Stefansky, 301 A.D.2d 562, 563-64 (N.Y. App. Div. 2003); *see also Russell v. Perrone*, 301 A.D.2d 835, 836, 754 N.Y.S.2d 403, 405 (N.Y. App. Div. 2003) (quoting *Cambridge Valley Bank v. Delano*, 48 N.Y. 326, 339-40 (N.Y. 1872) for the proposition that “[w]hen a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that which he is about to purchase, he is presumed *** to have made the inquiry and ascertained the extent of such prior right”); *In re Altmeyer*, 268 B.R. 349, 354 (Bankr. W.D.N.Y. 2001) (indicating that “[l]ong standing precedents of the New York State Court of Appeals have affirmed the duty to inquire and to investigate potentially meritorious issues affecting title”).

Thus, there is a presumption that the purchaser “examined the conveyances in his chain of title and . . . investigated all facts therein disclosed in any way affecting his rights under the conveyance he was about to accept.” *Sweet v. Henry*, 175 N.Y. 268, 277, 67 N.E. 574, 576 (N.Y.

⁶ The “chain of title” is comprised of “recorded deeds or other recorded instruments of transfer tracing the origin of the debtor’s title to the property.” *In re Kennedy Inn Assoc.*, 221 B.R. 704, 713 (Bankr. S.D.N.Y. 1998).

1903); *see also* *Eltman v. Harvey*, 93 Misc.2d 634, 638 (N.Y. Sup. Ct. 1978)(noting that “the law assumes that a prudent purchaser will inspect them [deeds or other instruments contained in the chain of title to real property] and treats him on the basis of his having knowledge of their *contents* whether he has seen them or not (emphasis supplied)”). However, “[a] purchaser is not normally required to search outside the chain of title in order to determine if it is defective.” *Doyle v. Lazarro*, 33 A.D.2d 142, 144, 306 N.Y.S.2d 268, 270 (N.Y. App. Div. 1970), *aff’d* 33 N.Y.2d 981, 309 N.E.2d 138, 353 N.Y.S.2d 740 (N.Y. 1974); *Eltman*, 98 Misc.2d at 638 (indicating that “matters outside the chain of title do not constitute notice”).

In making their argument, the Debtors fail to recognize that what is “contained in the record” or “chain of title” on file with the county clerk’s offices is more than simply the mortgages. The Court’s focus is on whether the Debtors, as prospective purchasers of Parcels I and II, would have had constructive notice of FSA’s and NBT’s claimed interests in the real property as of the commencement of the case upon review of the *contents* of the recorded documents identified in the Debtors’ chain of title, including the deed and the mortgages. “A purchaser can be considered to have constructive notice of an adverse claim if the facts were such as to cause a reasonable person to inquire as to the possible existence of a competing interest.” *In re Stanphill*, 312 B.R. 691, 694 (Bankr. N.D. Ala. 2004).

In *Stanphill* the parties executed a mortgage which was intended to cover all the property owned by the debtor, with the exception of approximately 19 acres. *Id.* at 693. By mutual mistake, the description in the mortgage did not include three separate parcels near or adjacent to some of the land described therein which belonged to the debtor. *Id.* Postpetition, the chapter 7 trustee filed a motion to sell the real property belonging to the debtor. In response to the

motion, the mortgagee caused a title search to be conducted which revealed that according to the recorded instrument, namely its mortgage, its lien did not extend to those three parcels belonging to the debtor. *Id.* The mortgagee commenced an adversary proceeding seeking to reform its mortgage and filed a motion seeking summary judgment. *Id.* The trustee cross-moved, seeking reclassification of the mortgagee's claim as entirely unsecured and also seeking authorization to sell the three properties. *Id.* The court found that "[i]f a mortgage wholly fails to describe the property to be included, the record does not provide constructive notice to a subsequent purchaser." *Id.* at 694. The court, in denying the mortgagee's request for reformation of the mortgage, also relied on the fact that the three omitted parcels were "separate and distinct tracts of land from those other properties described in the mortgage" and that there had been other parcels also belonging to the debtor that had been intentionally excluded from the mortgage. *Id.* at 694-95. The court found that "[a] subsequent purchaser examining the record would assume that the subject properties were additional parcels the parties intended to exclude from the mortgage. Consequently, the facts and circumstances were not such as to cause a reasonable person to inquire into the possible existence of Plaintiff's claimed interest [in the three parcels]." *Id.* at 695. Accordingly, the court denied the mortgagee's request for reformation, concluding that the relief would have been prejudicial to the trustee as a bona fide purchaser pursuant to Code § 544(a)(3). *Id.*

In this case, it is appropriate to view it in the hypothetical scenario of a potential bona fide purchaser. A purchaser would search the Grantor/Grantee Index to determine if the Debtors held title to Parcels I, II and III. Searching under the Debtors' names, a purchaser would discover not only the May 1980 deed, but also the subsequent mortgages of both CNB/NBT and FSA and the

financing statement filed by FSA.⁷ The parties acknowledge that the Debtors took title to Parcels I, II and III in 1980 and that the deed memorializing that transfer specified that the Debtors were not taking title to the Exceptions. Yet, there is no dispute that the four mortgages held by NBT and FSA contained descriptions of only Parcel III, as well as the Exceptions found in the deed, with respect to Parcels I and II. The Debtors acknowledge that it was their intent to encumber their interest in Parcels I, II and III to CNB/NBT and FSA when they executed those mortgages. Nothing in the chain of title indicates that the Debtors ever owned the Exceptions. A comparison of the property description as set forth in the deed, which includes a description of the Exceptions, and that contained in the mortgages would have placed a potential purchaser on notice that there might be an error in the descriptions in the mortgages and that it was the intent of the Debtors that CNB/NBT and FSA hold liens on Parcels I and II, as well as III, as set forth in their deed, such that the purchaser should make further inquiry concerning the extent of those interests.⁸ The Debtors are correct in their assertion that there is no property description of Parcel I and II in the mortgages; nor is there a property address or reference to a tax map mentioned in the mortgages. However, the Court believes it would have been reasonable for the purchaser to inquire of the Debtors about the parties' intent at the time the mortgages were executed given the description of the Exceptions in the deed, as well as the four mortgages. Such

⁷ Also found in the Debtors' chain of title are the lis pendens filed by NBT. These would have provided a bona fide purchaser with notice of NBT's interest in Parcels I, II and III. Although the Court has previously determined that the lis pendens are not voidable as preferences pursuant to Code § 547, it finds it unnecessary to consider the notice provided by them with respect to both the interest of NBT and that of FSA for purposes of this particular discussion.

⁸ The Court's conclusion may have been different had the property described in the mortgages not have been that of the Exceptions, which are clearly set forth in the Debtors' deed.

an inquiry would have revealed that there was an error in the property descriptions in the mortgages and that Parcels I and II were actually intended to be encumbered by the four mortgages, which would effect any interest in said property that a potential purchaser was considering obtaining. Accordingly, the Court concludes that the Debtors are not entitled to void the mortgages held by NBT and FSA pursuant to Code § 544(a)(3).

With respect to FSA's counterclaim requesting reformation of its mortgages, the Court is cognizant of the fact that as a court of equity, bankruptcy courts have granted a request for reformation of mortgages. *See In re Key*, 292 B.R. 879, 883 (Bankr. S.D. Ohio 2003); *In re PAK Builders*, 284 B.R. 663, 679 (Bankr. C.D. Ill. 2002); *In re Kildow*, 232 B.R. 686, 694 (Bankr. S.D. Ohio 1999); *see generally Rodriguez*, 261 B.R. at 94 (noting that the bankruptcy court had concluded that it was equitable to reform both the deed and the mortgage and no argument was made on appeal that this conclusion was in error). Indeed, the constructive notice attributed to a bona fide purchaser of Parcels I and II would equally apply to any creditors who might have taken an interest in the parcels subsequent to NBT and FSA. However, NBT has suggested that there may also be a problem with the accuracy of the mortgage descriptions concerning Parcel III, as well. The Court deems it more appropriate to have the entire issue of reformation of the four mortgages be addressed in a single forum by the state courts.

Based on the foregoing, it is hereby

ORDERED that the motion of FSA seeking to dismiss the sixth and seventh causes of action of the Debtors' Complaint⁹ is granted; it is further

ORDERED that the cross-motion of the Debtors seeking summary judgment as to the sixth and seventh causes of action of their Complaint against FSA based on Code § 544(a)(3) is denied; it is further

ORDERED that the Debtors' motion seeking summary judgment as to the first and second causes of action their Complaint against NBT based on Code § 544(a)(3) is denied; it is further

ORDERED that the Debtors' motion seeking summary judgment as to the third and fourth causes of action of their Complaint against NBT based on Code § 547 is denied; and it is further

ORDERED that the motion of FSA seeking reformation of its mortgages is denied without prejudice; and it is finally

ORDERED that the automatic stay be modified to allow both NBT and FSA to seek reformation of their mortgages in State Court.¹⁰

Dated at Utica, New York

⁹ FSA's motion requests summary judgment as to the entire Complaint. The Debtors' fifth cause of action states that it is against FSA. However, the facts set forth in support of that particular cause of action references actions taken by NBT to replevy the Debtors' livestock and equipment and to reform and foreclose on its mortgages. None of the parties have made express reference to this particular cause of action in seeking summary judgment and have not presented the Court with any facts with which to make a determination. Accordingly, the Court will not consider the fifth cause of action in ruling on the motions and cross-motion for summary judgment.

¹⁰ Although neither NBT nor FSA have sought relief from the automatic stay, the Court deems it appropriate, given its conclusions, to grant such relief to the limited extent of allowing NBT and FSA to seek reformation of their mortgages in State Court. The Court, however, is not granting relief from the automatic stay to proceed with foreclosure in the State Court.

this 2nd day of March 2005

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge